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CN-49

August 14, 2008

223281

BY E-FILING

The Honorable Anne K Quinlan, Esq
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W
Washington, DC 20423-0001

Re: *Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company* (STB Finance Docket No. 35087)

Dear Ms Quinlan

Enclosed for filing in the above referenced docket please find Applicants' Petition to Modify the Procedural Schedule to Provide for a Prompt Final Decision on the Merits Under 49 U S C. § 11324(d)(1) Subject to a Condition Preserving the Environmental *Status Quo* Pending Environmental Review (CN-49) Please note that we have requested expedited consideration for this filing

Very truly yours,

Paul A. Cunningham

Counsel for Canadian National Railway Company and Grand Trunk Corporation

Enclosure

cc All parties of record

CN-49

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY

APPLICANTS' PETITION TO MODIFY THE PROCEDURAL SCHEDULE TO *PROVIDE FOR A PROMPT FINAL DECISION ON THE MERITS UNDER* 49 U.S.C. § 11324(d)(1) SUBJECT TO A CONDITION PRESERVING THE ENVIRONMENTAL *STATUS QUO* PENDING ENVIRONMENTAL REVIEW

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APPLICANTS' PETITION TO MODIFY THE PROCEDURAL SCHEDULE TO PROVIDE FOR A PROMPT FINAL DECISION ON THE MERITS UNDER 49 U.S.C. § 11324(d)(1) SUBJECT TO A CONDITION PRESERVING THE ENVIRONMENTAL *STATUS QUO* PENDING ENVIRONMENTAL REVIEW

Pursuant to 49 C F R § 1117 1 (permitting petitions for relief not otherwise covered), Canadian National Railway Company and Grand Trunk Corporation (together "CN" or "Applicants")[1] respectfully request that the Board serve on or before September 15, 2008, a decision modifying the procedural schedule in this proceeding ("September Scheduling Decision") *This modification would provide for the Board to serve by October 15, 2008, a final* decision ("October Merits Decision"), effective November 14, 2008, that would (1) determine whether to approve CN's proposed acquisition and control of EJ&E West Company ("EJ&EW") ("Transaction") pursuant to 49 U S C. § 11324(d)(1), on the ground that the proposed transaction would not cause adverse competitive impacts that are both "likely" and "substantial," and (2) if approval is granted, (i) condition such approval on any terms that the Board determines are

[1] Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations at CN-2 at 8-11

required to protect competition, the usual labor protective conditions, and on CN preserving the environmental *status quo*[2] until completion of the Board's ongoing environmental review, and (ii) defer until the conclusion of the Board's environmental review the imposition of any conditions governing any change in the environmental *status quo* ("Deferred Environmental Decision").[3]

CN's proposal would permit the Board to consider approval of the Transaction under the Interstate Commerce Commission Termination Act ("ICCTA") and issue a final and effective decision in time to permit CN to close the proposed Transaction by December 31, 2008, subject to a condition requiring that CN cause no transaction-related environmental effects pending the Board's completion of its environmental review. This would fully preserve the Board's rights to impose any lawful environmental mitigation that it might determine is required with respect to any Transaction-related activities before those activities occur. The Board could thus discharge its obligations under both ICCTA and the National Environmental Policy Act ("NEPA")

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[2] CN's proposed condition to maintain the environmental *status quo* would preclude CN, pending environmental review and a subsequent order in this proceeding, from undertaking Transaction-related actions (such as the re-routing of trains from intra-Chicago routes to the EJ&E) that could cause adverse environmental impacts. Actions that EJ&E would be required to undertake in the absence of the Transaction, such as the service of existing or new traffic tendered by shippers or legally required interchange of new trains with carriers not under the control of CN, would not be subject to this condition. Should questions arise as to whether a potential action would comply with this condition, CN would seek advance Board advice as to whether such action was permitted.

[3] In order to assure the Board and the public that the Board's adoption of CN's proposal would not impair in any way the Board's powers with respect to environmental protection, CN proposes that any approval granted in the October Merits Decision be conditioned on CN stipulating that the Board retains, for exercise in its Deferred Environmental Decision, all legal authority the Board currently possesses to impose environmental conditions in this proceeding.

CN reserves its rights, however, to seek an acceleration of Board action should environmental review under NEPA proceed unreasonably past the period suggested by Decision No. 13, although CN is not here seeking any additional definition of that period.

Because any party would be free to challenge both the October Merits Decision and the Deferred Environmental Decision, Board action in accordance with CN's proposal would not impair any party's legal rights And the only risk it would create would be borne by CN. If the Board conditionally approved the Transaction, as outlined above, in an October Merits Decision, and CN proceeded to close the Transaction, it would be doing so with no assurance as to any environmental conditions that the Board might impose after the closing

CN respectfully requests that the Board issue the September Scheduling Decision as soon as possible, and no later than September 15, 2008, and it seeks expedited consideration insofar as it is necessary If the Board denies this request or does not act by that date, CN will be prepared to petition the U S Court of Appeals for the D C Circuit immediately for a writ of mandamus compelling the Board to issue a final decision under 49 U S C. § 11324(d) in time to permit CN to close the Transaction, if approved, by December 31, 2008 By waiting to file such a mandamus petition until the Board has a chance to act on the present petition, CN hopes to avoid the need for judicial intervention

CN's request that the Board act by September 15, 2008, is intended to provide sufficient time for the Board to act and, if necessary, for the Court to consider the merits of CN's mandamus petition and grant effective relief Thirty days (or less) should suffice for the Board to issue the September Scheduling Decision That decision would be purely procedural in that it would determine only whether the Board will issue a final decision by October 15, 2008 The October Merits Decision (to be effective November 14, 2008) would be limited to determining whether the Application meets the competition standards for approval under 49 U.S C. § 11324(d)(1), as to which the record has long been closed, and imposing the conditions necessary to preserve the environmental *status* quo and any required competition or labor

conditions Neither the September Scheduling Decision, which need not address substantive merits issues, nor the October Merits Decision, which would reserve environmental issues for later decision, would prejudice any party

BACKGROUND

On October 30, 2007, Applicants filed a Railroad Control Application ("Application") seeking authorization to acquire and control EJ&E West Company The Application was predicated on the Stock Purchase Agreement ("SPA") between Applicants and Elgin, Joliet & Eastern Railway Company ("EJ&E"), which is an indirect subsidiary of United States Steel Corporation ("USS") The SPA created the risk that EJ&E could terminate the SPA (and thus the Transaction) if the Transaction were not approved and closed by December 31, 2008 *See* SPA § 2 3 (CN-2 at 259) Under the SPA, that risk would only emerge more than 180 days after the deadline set by Congress for S TB review of what the parties correctly anticipated would be a "minor" transaction.

On November 26, 2007, the Board accepted the Application and designated the Transaction as "minor" under the Board's rules Decision No 2, slip op. at 9. Minor transactions are those that do not involve two or more Class I railroads and for which a threshold determination can be made either (1) that the transaction clearly will not have any anticompetitive effects, or (2) that any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. 49 C.F R § 1180 2(b) The Board concluded that the Application satisfied this standard

Because the Transaction is "minor," ICCTA required the Board to issue a final decision within 180 days of the filing of the Application (*i e* , by April 25, 2008) 49 U S C. § 11325(a),

(d)(2) Accordingly, when the Board accepted the Application, it stated that under Section 11325(d)(2) "a final decision would be issued by April 25, 2008," with an effective date 30 days later Decision No 2, slip op at 19, n 20 & n 21 A decision by April 25 would have complied with the ICCTA deadline However, in a decision that was unprecedented for a "minor" transaction, the Board also decided that its Section of Environmental Analysis ("SEA") would prepare an environmental impact statement ("EIS"), rather than an environmental assessment ("EA"). The Board also decided that it would extend the final decision date beyond the statutory deadline if necessary to accommodate completion of the EIS. Decision No 2, slip op at 13-16.

The Board set deadlines for briefing on the merits of CN's Application under ICCTA's governing standards Decision No 2, slip op. at 19 Briefing went forward based on that schedule and has now been complete for over three months Numerous comments and statements of support were filed by a broad spectrum of shippers (including the National Industrial Transportation League), rail carriers, business groups (including the U S. Chamber of Commerce), communities, and government officials attesting to the potential public benefits of the Transaction. *See* CN-29 at 7-11, CN-48 Among other public benefits, the Transaction would insure a more efficient and reliable rail transportation system at a lower cost, reduce rail congestion and increase rail capacity in Chicago's urban core, and increase flexibility for CN operations, positively benefiting its current and future shippers *See* CN-2 at 23 The Transaction would also provide a privately funded, partial remedy to the costly and inefficient rail congestion in Chicago,[4] which is particularly critical given the absence of meaningful

[4] By doing so, the Transaction will help to keep rail competitive with the trucking industry, and prevent freight from shifting from rail to trucks This would have important public benefits, in that it would increase capacity on highways, reduce the pressure to construct additional costly, disruptive highway capacity, reduce fuel consumption and greenhouse gas emissions, and decrease the risk that hazardous materials will be spilled The Government Accountability

government funding for CREATE or any other possible regional solution.[5] In addition, the Transaction would benefit communities along CN's current lines to and from Chicago, as well as other communities inside the EJ&E suburban arc (with a larger total population than that of the suburban communities along that arc), through decreased noise, congestion, and delay as a result of a reduction in train traffic

Few objections to the Transaction were raised on competition grounds, and CN rebutted those that were raised. *See, e g*, Applicants' Response to Comments, Requests for Conditions, and Other Opposition & Rebuttal in Support of the Application (CN-29) (filed March 13, 2008), *Applicants' Surrebuttal to Additional Comments Filed On or After March 13, 2008* (CN-31) (filed Apr 28, 2008) It is evident from the totality of comments submitted to the Board directly and to SEA that opposition to the Transaction rests primarily on concerns about environmental impacts rather than competitive impacts.

Office has found that "[n]ew rail capacity . has the potential to benefit the public by improving traffic flow, air quality, and safety at the national, state, and local levels " U S Gov't Accountability Office, *Freight Railroads Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed* 53 (Oct 2006), *available at* http //www gao gov/new items/d0794 pdf

[5] *See* Letter from Richard M Daley, Mayor, City of Chicago to Anne K Quinlan, Secretary, Surface Transportation Board (Jan. 15, 2008), *available at* http //www stb dot gov/Ect1/ ecorrespondence nsf/PublicIncomingByDocketNumber/E734AD64D5DD7A6A852573E900555 E4F/$File/01176 011508 DALEY LOCL 60604 S N PDF?OpenElement ("We believe this transaction will advance specific CREATE objectives more expeditiously than envisioned by CREATE and without the need for public funding "), Preliminary Comments of U S Department of Transportation (DOT-2) at 3 (filed January 25, 2008) (the proposed Transaction "would have the additional benefit of advancing a central goal of the Chicago Region Environment and Transportation Efficiency ("CREATE") project ") *See also Attacking the Gridlock*, Chicago Tribune, Apr 24, 2008, at 24 *available at* 2008 WLNR 7587742 (CN's investment in EJ&EW "would ease highway traffic congestion by adding new capacity to carry freight to and through Chicago" and "could be the catalyst needed to begin unsnarling the costly rail congestion [in Chicago]"), *State Should Get on Board to Modernize Railroads*, Business Ledger, May 12, 2008, *available at* http //www thebusinessledger com/Home/Archives/InTheNews/tabid/85/mid/393 newsid393/338/Default aspx

CN has questioned the need for an EIS, and CN maintains that, as a matter of law, environmental review under NEPA cannot excuse a failure to comply with ICCTA's statutory deadlines. However, CN has done everything possible to help facilitate and expedite the environmental review process CN has already paid the independent environmental consultants who are assisting and operating under the direction of SEA more than $10 5 million dollars, expects to be required to pay at least $7 5 million more through the end of the year, and has provided all of the data requested by SEA and its consultants for their analysis. In addition, with the help of another group of independent consultants, CN has conducted extensive environmental analyses in order both to answer SEA's factual inquiries and develop mitigation plans, engaged in extensive community outreach efforts, developed and filed with SEA voluntary mitigation plans that would meet all of the standards for mitigation adopted by the Board in other cases, and engaged any community that has evidenced interest in negotiations to secure voluntary mitigation agreements

Despite CN's full cooperation, the Board's environmental review remains incomplete, with no firm date for completion, months after the statutory deadline under ICCTA and the conclusion of briefing on the merits of the Application under ICCTA's approval standards By May of this year, it appeared that there was a substantial risk that the Board might not issue a final effective decision on the Application in time to permit a closing by December 31, 2008

In an effort to eliminate this risk, CN filed its Request for Time Limits on May 13, 2008, seeking the establishment of deadlines for completion of the environmental review and issuance of a final Board decision in time to permit the Transaction to close by December 31, 2008 CN explained the risk of termination under the SPA, cited the 180-day mandatory deadline for decision on a "minor" transaction, and argued that under Supreme Court precedent, in the event

of a conflict between an agency's mandatory statutory deadline and NEPA, it is NEPA, not the deadline, that must yield CN-33 at 14-16

The Board denied CN's request for a 2008 deadline for final decision, and instead set a "projected" timetable that extends into 2009 with no fixed end date Decision No 13 at 7-8 The Board stated that Section 9.1 of the SPA "seems to conflict with section 2 3," calling into question whether a party could unilaterally terminate the SPA if closing was delayed for environmental review Decision No 13 at 5-6. Further, although the Board recognized that 49 U S C. § 11325(d) "does set time deadlines for minor transactions" (*id* at 6), it opined that Section 11325(d) "allows for discretion on the part of the Board, where appropriate, and does not contain predetermined outcomes if the deadlines in section 11325(d) are not met " *Id* The Board's timetable projects issuance of a final EIS ("FEIS") between December 1, 2008 and January 31, 2009, with a final decision on the Application to be issued, and to become effective, at unspecified later dates *Id* at 8. The Board also reserved the right to adjust this already uncertain schedule as necessary *Id* at 7

Decision No 13 provided no certainty that there would be a final effective decision on the Transaction before 2009 Thus, the substantial risk that the Transaction would be terminated without the Board ever deciding its merits remains

Following Decision No 13, CN asked USS to agree to modify the SPA or take other action to eliminate the risk that a party might serve notice under Section 2.3 of the SPA that it terminates or abandons the Transaction if the Board does not issue a final decision in time for the Transaction to close by December 31, 2008 USS declined CN's request

The combination of Decision No 13 and USS's denial of CN's request has further highlighted the risk that the Transaction may be terminated before the Board addresses its merits The purpose of this petition is to eliminate that risk To that end, CN is willing to accept the conditions described above to maintain the environmental *status quo* in order to permit both the prompt closing of the Transaction and full and effective environmental review of the Transaction before the initiation of any Transaction-related activities that could adversely affect the environment. As discussed below, there is ample authority and reason for the Board to grant CN's petition, and no substantial basis for denying it.

DISCUSSION

The Board and CN face a timing problem There is a substantial risk that the Transaction will be terminated if not closed by December 31, 2008, yet under the Board's present schedule it is unlikely to rule on the merits of CN's Application by that date. This timing problem does not reflect any difficulty in applying ICCTA's standards for approval (49 U S.C § 11324(d)), which were fully briefed months ago. Instead, as the Board explained in Decision No 13, the timing problem arises from the Board's effort to issue a final EIS before issuing a final decision

CN proposes that the Board solve this problem by first deciding whether to approve the Transaction, with conditions that preserve the environmental *status quo* (the October Merits Decision), and subsequently completing its environmental review and imposing such environmental conditions as may be lawful and appropriate (the Deferred Environmental Decision) The Board has in the past authorized or permitted other transactions to close while deferring environmental review By doing so here in accordance with CN's proposal, the Board could fully preserve its own legal powers and the legal rights of CN, opponents of the Transaction, and persons with environmental concerns

In Part I below, CN demonstrates that ICCTA requires the Board to issue a final approval decision here without further delay In Part II, CN demonstrates that deferring environmental review in accordance with CN's proposal is consistent with the requirements of NEPA and the Board's own precedent and practice, and will not impair any powers the Board has to protect the environment Finally, in Part III, CN explains why its proposed modified schedule is reasonable and should be adopted

I. ICCTA REQUIRES THE BOARD TO ISSUE FINAL APPROVAL OF THE TRANSACTION PROMPTLY IF THE TEST FOR APPROVAL SET FORTH IN 49 U.S.C. § 11324(d)(1) IS MET, WHICH THE BOARD CAN DETERMINE WITHOUT AWAITING ENVIRONMENTAL REVIEW

ICCTA requires the Board to approve any transaction not involving two Class I railroads unless the Board finds both that

> (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, and
>
> (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs

49 U S C. § 11324(d) Under this standard, if the Board is unable to make either of these findings, approval of the proposed transaction is mandatory

The Board also has a statutory duty to issue its approval decision "in an expeditious manner " Decision No 13, at 6 Indeed, as the Board has recognized (*id*), ICCTA imposes a statutory deadline on the Board's final approval decision that passed over 100 days ago 49 U S C § 11325(d)(2)

In accordance with its plain language, the Board and its predecessor have consistently interpreted Section 11324(d)(1) to require approval of any control transaction not involving two or more Class I railroads unless it finds that the transaction will cause adverse competitive

impacts that are both "likely" and "substantial."[6] In order to make this determination, the Board need not complete its environmental review. The record on the merits of these competition issues has been fully developed and has now been complete for over three months. And, although potential environmental impacts might be relevant to a "public interest" assessment under subsection (d)(2), the separate determination under subsection (d)(1), which is independently sufficient for approval, contains no such element and relates solely to an analysis of potential competitive effects.

II. THE BOARD HAS AUTHORITY, CONSISTENT WITH NEPA AND ITS PAST PRACTICE, TO COMPLETE ITS ENVIRONMENTAL REVIEW AFTER FINAL APPROVAL OF THE TRANSACTION IF IT REQUIRES MAINTENANCE OF THE ENVIRONMENTAL *STATUS QUO* PENDING SUCH REVIEW IN ACCORDANCE WITH CN'S PROPOSAL

CN's proposal here would enable the Board to discharge its obligations under ICCTA without violating NEPA or surrendering any authority or ability to protect the environment. Under CN's proposal, the October Merits Decision would have no effect on the environment, because if the Board approved the Transaction, it would do so subject to a condition requiring CN to maintain the environmental *status quo* pending the completion of the Board's environmental review and the Deferred Environmental Decision. When the Board did take action that could affect the environment, in its Deferred Environmental Decision, that action would be based on the FEIS. Moreover, the Board would not lose any power to protect the environment, because as a condition of the October Merits Decision, CN would stipulate that the

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[6] *See, e.g., Canadian Nat'l Ry. - Control – Duluth, Missabe & Iron Range Ry.*, STB Finance Docket No. 34424, slip op. at 13 (STB served Apr. 9, 2004); *Canadian Nat'l Ry. – Control – Wisc. Cent. Transp. Corp.*, STB Finance Docket No. 34000, slip op. at 10 (STB served Sept. 7, 2001); *Kansas City S. Indus., Inc. – Control – Gateway W. Ry.*, STB Finance Docket No. 33311, slip op. at 4 (STB served May 1, 1997); *CSX Corp. – Control – Indiana R.R.*, STB Finance Docket No. 32892, slip op. at 3-4 (STB served Nov. 7, 1996).

Board will retain, for exercise in its Deferred Environmental Decision, all the legal authority it currently possesses to impose environmental conditions on a "minor" transaction [7]

Even assuming, contrary to CN's view (*see* CN-33, at 15-16), that NEPA's requirements are not displaced by ICCTA's provisions for the approval of a "minor" transaction, there can be no NEPA- or environmental protection-based objection to the Board's deferring environmental review in accordance with CN's proposal. NEPA would not require an EIS before the October Merits Decision, because that decision would not affect the environment, and any NEPA requirement to undertake detailed environmental review applies only to federal actions that significantly affect "the quality of the human environment." 42 U S C § 4332(2)(C) As the Supreme Court has explained, NEPA does not require an EIS unless the federal action at issue is "proximately related to a change in the physical environment " *Metro Edison Co v People Against Nuclear Energy*, 460 U.S 766, 774 (1983) A change in control, which is all that the October Merits Decision would authorize, does not implicate NEPA· "economic or social effects are not intended by themselves to require preparation of an environmental impact statement." 40 C F R § 1508 14 (CEQ regulations)

The Board's own past practice is consistent with this clear law The Board has repeatedly found that it has authority to defer environmental analysis when it authorizes an acquisition or control transaction if it conditions its authorization on restrictions on operations and/or construction that maintain the environmental *status quo* pending the completion of its environmental analysis For example, in *Canadian Pacific Ry Control – Dakota, Minnesota & Eastern R R* , STB Finance Docket No 35081, Decision No 9 (STB served April 3, 2008)

[7] Although CN would retain its rights to challenge environmental conditions, it would have given up the opportunity to avoid those conditions by declining to close the Transaction

("*CP/DM&E*"), the Board recently determined that, consistent with NEPA, it could authorize CP's proposed acquisition of DM&E without conducting any environmental review of potential future movements of coal, so long as its approval is conditioned on "precluding such movements pending completion of that EIS and issuance of a final decision addressing the impacts of such coal operations and allowing such operations to begin, if appropriate." *Id* at 1. The Board rejected objections to its conditioned approval and deferred environmental analysis approach, finding that it would neither preclude consideration of any cumulative impacts, nor improperly segment the environmental review process. *Id* at 10-11.

The Board had previously followed this same approach in *Iowa, Chicago & Eastern R R – Acquisition and Operation Exemption – Lines of I & M Rail Link, LLC*, STB Finance Docket No. 34177 (STB served July 22, 2002), wherein the Board denied requests to stay, pending environmental review, the effectiveness of a notice of exemption filed by IC&E to acquire and operate the rail lines and assets of IMRL. Instead of delaying authority for the transaction, the Board imposed a condition precluding DM&E from handling any traffic moving to or from the line the Board had previously approved for construction in *Dakota, Minnesota & Eastern R R Construction Into the Powder River Basin*, STB Finance Docket No. 33407 (STB served Jan. 30, 2002), pending subsequent environmental review by the Board at such time as DM&E might be ready to handle that potential future traffic.

These decisions are consistent with the Board's earlier decision to authorize the control transaction proposed in *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.*, 1 S.T.B. 233 (1996), *aff'd sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999) ("*UP/SP*"), 1 S.T.B. 233 (1996). Issues remained relating to increased traffic through Reno and Wichita, but the Board deferred a final resolution of mitigation measures. It did so by

conditioning its final approval on interim operating restrictions that prohibited UP and SP from increasing traffic for those segments above the Board's threshold level for environmental analysis *Id at* 515-518 (1996) Pending resolution of mitigation issues, UP and SP were allowed to add an average of two additional freight trains per day to those segments, which the Board found sufficient to ensure that "the environmental status quo will essentially be preserved." *Id* at 516 *See also id.* at 517 n.267.

Here, the October Merits Decision that CN seeks would even more clearly fall outside the ambit of NEPA and within the Board's authority Since, under CN's proposal, the October Merits Decision would condition approval on maintenance of the environmental *status quo*, it could not, by definition, cause changes to the environment that could implicate NEPA review As the Board noted in *UP/SP*, "[t]he courts have recognized that there is no violation of NEPA where proposed actions will not effect a change in the status quo *See, Sierra Club v FERC*, 754 F 2d 1506, 1509-10 (9th Cir 1985)"[8] *UP/SP*, 1 S T B at 516 n 264

In sum, the plain language of NEPA, appellate decisions, and the Board's own precedent and practice forcefully demonstrate that the conditioned approval and deferred environmental review that CN proposes in this petition would not violate NEPA or in any way impair the Board's ultimate legal authority with respect to environmental protection

[8] *Sierra Club* reflects the clear limitations on the scope of NEPA recognized in CEQ regulations and other court decisions Accordingly, courts have held, even in the absence of conditions maintaining the environmental *status quo*, that decisions related only to a change in control require no environmental analysis under NEPA *See e g. Burbank Anti-Noise Group v Goldschmidt*, 623 F.2d 115 (9th Cir 1980) (EIS not required when Federal agency assists private group purchase of existing airport). *Comm of Auto Responsibility v Solomon*, 603 F 2d 992, 1001-03 (D C Cir 1979) (NEPA not implicated by GSA lease of existing parking facility)

III. CN'S PROPOSED MODIFICATION TO THE BOARD'S PROCEDURAL SCHEDULE IS REASONABLE AND SHOULD BE ADOPTED TO PROTECT THE PUBLIC INTEREST IN THE TRANSACTION

If the Board accepts CN's proposal, it can (1) discharge its duty under 49 U S C § 11324(d), by issuing the October Merits Decision, (2) thereby mitigate its ongoing failure to adhere to the timing requirements of 49 U S C § 11325(d)(2), (3) satisfy any NEPA requirements and avoid surrendering any authority or ability to protect the environment by preserving the environmental *status quo* pending completion of its FEIS and further Board action in a Deferred Environmental Decision, and (4) preserve the legal rights of all interested parties If it does so promptly, the Board can ensure that it does not, by means of delay, cause the termination of the Transaction at the end of the year Prompt action is both required under law *and essential to avoid the loss of all of the potential public benefits of the Transaction that would* occur if the Transaction were terminated for want of a decision by the Board [9]

The timing proposed here by CN is reasonable. CN is proposing two decision dates for the Board in order to implement this proposal [10] First, CN asks that the Board issue an initial procedural decision (the September Scheduling Decision) on or before September 15, 2008, providing that it will determine whether the Application meets the standards for approval under Section 11324(d)(1) in time to issue a second and final decision on the merits (conditioned, as necessary, to preserve the environmental *status quo*) (the October Merits Decision) by October

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[9] See also the Rail Transportation Policy under 49 U S C § 10101, which, among other things, calls for the Board to "minimize the need for Federal regulatory control," to provide "fair and expeditious regulatory decisions when regulation is required," and "to ensure the development and continuation of a sound rail transportation system " *Id* at § 10101(2), (4)

[10] CN's proposal differs significantly from the Board's past use of bifurcated decisions in rail construction cases, in which the Board has reserved its final decision on the merits of a proposal, pending completion of the environmental analysis Here, for the reasons discussed above, the Board's October Merits Decision under ICCTA would be final and effective, and would permit consummation of the control transaction

15, 2008 (effective 30 days later on November 14, 2008) CN is requesting September 15, 2008 (or earlier) as the date for the September Scheduling Decision, because 30 days appears sufficient for the Board to make what is purely a decision whether to decide, which involves no factual predicates and which would fully preserve the legal rights of all concerned By issuing its initial decision expeditiously, the Board can facilitate an orderly process whereby CN can await the Board's decision and still have time to seek judicial relief if necessary.

If the Board adopts CN's proposal, the second decision for the Board, by October 15, 2008, would be the substantive decision of whether to approve the Transaction pursuant to Section 11324(d)(1). The record cannot support a finding that the Transaction will cause adverse competitive impacts that are both "likely" and "substantial " Accordingly, Section 11324(d)(1) requires that the Transaction be approved If the Board concurs, the Board would impose the standard labor protective conditions, any conditions it determines are required to protect competition, and a condition preserving the environmental *status quo* pending completion of the Board's ongoing environmental review and the Deferred Environmental Decision

CN's proposed schedule provides more than 60 days between the date of this petition and the date for the October Merits Decision This represents a considerably longer decision period than the Board had provided itself under Decision No 2 (absent potential delays for its environmental analysis) *See* Decision No 2 at 19, n 20 (setting March 13, 2008 as the date for responses to comments and for rebuttal, and noting that under statutory deadlines a final decision would be required by April 25, 2008) And it is a longer period than the Board has typically provided itself in other "minor" transactions for a final decision after the record has closed [11] By

[11] *See, e g , Dakota Minn & E R R – Control – Iowa, C & E R R*, STB Finance Docket No 34178 (STB served Sep 26, 2002) (setting Dec 13, 2002 as the date for responses to comments and for rebuttal and Jan 27, 2003 as the date for final decision (45 days for decision)), *Canadian*

issuing its final decision by October 15, 2008, the Board could provide its usual 30 days before its decision takes effect, and still have sufficient time to consider and dispose of any petitions for reconsideration before December 31, 2008 Moreover, if the Board approves the Transaction (with conditions, as appropriate), issuance of the Board's final decision by October 15, 2008, will allow CN time to assure that the SPA's closing preconditions are met in time to close the Transaction on or before December 31, 2008. *See* SPA, Articles VI & VII (CN-2 at 286-89).

By adopting CN's proposed schedule, the Board can ensure an orderly and fair process that will eliminate the substantial risk that the considerable public benefits that the Transaction is likely to yield will be lost as a result of Board inaction

CONCLUSION

For the foregoing reasons, CN respectfully requests that the Board issue by September 15, 2008, an order modifying the procedural schedule in this proceeding to provide that the Board will issue by October 15, 2008, a final decision on the Application, to be effective by November 14, 2008 CN requests that the Board's September 15, 2008, order provide that its final decision by October 15, 2008, will be based on the statutory criteria for approval of a "minor" transaction under 49 U S C § 11324(d)(1), without regard to potential environmental issues, with any approval conditioned on CN effectively preserving the environmental *status quo* until the Board completes its environmental analysis and imposes such environmental conditions as are consistent with law and the record of this proceeding

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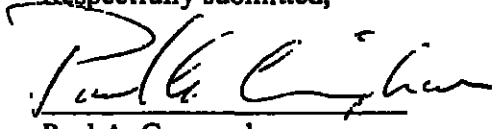
Nat'l Ry – Control – Wisc Cent Transp Corp, STB Finance Docket No 34000, (STB served May 9, 2001) (setting July 25, 2001 as the date for responses to comments and for rebuttal and Sep 7, 2001 as the date for final decision (44 days for decision)).

Respectfully submitted,



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August 14, 2008

CERTIFICATE OF SERVICE

I certify that I have this 14th day of August, 2008, served copies of Applicants' Petition to Modify the Procedural Schedule to Provide for a Prompt Final Decision on the Merits Under 49 U S C. § 11324(d)(1) Subject to a Condition Preserving the Environmental *Status Quo* Pending Environmental Review upon all known parties of record in this proceeding by first-class mail or a more expeditious method

Jared H Powell